No. 22215

United States
COURT OF APPEALS
for the Ninth Circuit

JACK D. HOUGHTON,

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

BRIEF FOR THE APPELLANT

Appeal from the Tax Court of the United States

WARDE H. ERWIN,
3323 S. W. Harbor Drive,
Portland, Oregon,
Attorney for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1-68

SUBJECT INDEX

INDEX OF AUTHORITIES CITED

Page

Cases

SUBJECT INDEX (Cont.)

STATUTES

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JURISDICTION

This action was commenced in the Tax Court of the United States as a claim for review of the statutory notice of deficiency in income tax.

Such review is authorized by 26 U.S.C. 7482.

The Tax Court allowed a motion for summary judgment of dismissal for lack of jurisdiction.

Petitioner requests a review of such determination. This Court has jurisdiction to determine that matter under 26 U.S.C. 7482.

STATEMENT OF THE CASE

There is only one question raised upon this review, to-wit:

Did the Tax Court of the United States err in determining that it did not have jurisdiction to determine the accuracy of a proposed deficiency in income taxes on the ground that the petition of taxpayers was not filed within 90 days of the mailing of a Notice of Deficiency?

The basis of the Tax Court's allowance of the Motion for Summary Judgment for lack of jurisdiction was that the petition was filed more than 90 days after the mailing of a Notice of Deficiency (Ref. Title 26 U.S.C. Sec. 6213 (a), (I.R.C. 1954).

It is conceded that the Section last above quoted requires filing of a petition within 90 days following a proper mailing of a Notice of Deficiency.

However, petitioners contend that the Notice of Deficiency which taxpayers seek to review (1) was not sent to the taxpayers' *last known address*, (2) that a copy of the Notice should have been sent to the attorney for petitioners, and (3) that the District Director abandoned his attempted service by mail by subsequently serving a copy on the attorney for taxpayers, and that the petition was filed within 90 days of the receipt of actual knowledge of the Notice of Deficiency.

It is undisputed that taxpayers did not ever, at

any time receive personally a Notice of Deficiency. The only Notice ever mailed was a 90-day letter, and that letter was returned to the Internal Revenue Service without delivery (Tr. 48).

It is undisputed that the Internal Revenue Service had in its possession at all pertinent times a signed Power of Attorney appointing Warde H. Erwin as attorney, and an adequate address to insure actual notice (Tr. 47).

It is undisputed that previous dealings had been held between Internal Revenue Service, and the designated attorney regarding the same claim.

It is undisputed that the internal records of the Internal Revenue Service disclose that a Power of Attorney had been received, and that copies of all correspondence were directed to be sent to the attorney named, but that no copies were ever sent or received by the attorney; hence neither the taxpayers nor their attorney were advised of the Notice of Deficiency and that as a result, the attorney billed the taxpayer and closed his file (Tr. 48).

It is also undisputed that the court has held that none of the foregoing undisputed facts gives the taxpayer a right to have his determination reviewed by the court for the following reasons:

1. It makes no difference that the notice was not received, since it was sent to the taxpayers' residence, and the letter carrier says he left a yellow slip in the rural mail box of taxpayers and "shut the door."

2. That it makes no difference that dealings had been had with the attorney relative to the matter or that a signed Power of Attorney was on file, and that the Internal Revenue Service was not obliged to send any notice to the attorney.

It makes no difference that Public Law 89-332 (5 U.S.C. 1012, 1013; 5 U.S.C.A. 500) requires Notice to be sent to an attorney when the party is so represented.

The question of jurisdiction of the tax court was raised by a defendant filing a motion for summary judgment for lack of jurisdiction followed by a hearing as to whether or not a proper Notice had been sent and whether or not a period in excess of 90 days had elapsed after said Notice (if properly sent) before a petition for review was filed in the tax court (Ref. Title 26, Section 6212).

SPECIFICATIONS OF ERROR

I

The Court erred in finding that the Notice of Deficiency was sent to petitioner at his *last known address* pursuant to Section 6212 I.R.C. 1954 (Tr. 69) for the reason that taxpayers had been divorced and had notified the District Director of other addresses, including that of his attorney.

II

The Court erred in finding that the provisions of

P. L. 89-332, (5 U.S.C. 1012 and 1013; 5 U.S.C.A. 500) does not require notice to the taxpayers' attorney because petitioners' attorney did not file with Internal Revenue Service a declaration that he is a member in good standing of the Bar of any state, and in further finding that even if a sufficient declaration was filed, that provisions of the law did not effect the validity of Notice sent to petitioners whether received or not and that the Statute did not make it mandatory to send a copy of the Notice to the attorney (Tr. 69).

The error of the Court was in overruling Petitioners' contentions that the sections of the law (5 U.S.C. 1012 and 1013; 5 U.S.C.A. 500) (P. L. 89-332) does make mandatory the sending of notice to an attorney who appears for a client before the Internal Revenue Service and for the further reason that statements and law applicable were sufficient to constitute a declaration of membership in the bar in good standing.

Further, for the reason that by dealing with the attorney, the respondent is estopped to question his authority.

III

The Court erred in holding that the petition was not timely filed for the reasons that the petition was filed promptly after the petitioners received notice that a "deficiency" was being claimed, and in failing to find that the District Director abandoned his attempted service by mail by forwarding the same to

the attorney upon discovery that no notice had been given to the attorney.

ARGUMENT

Summary

This matter factually is not in substantial dispute.

The effect of the Court's holding is to defeat the taxpayer's right to a review of an additional income tax assessment of which assessment the taxpayers had no notice, and further had no notice that a claim had ever been made until final assessment was received.

There is no dispute that had a copy of the Notice of Proposed Deficiency been sent to the attorney, the Petition for Review would have been promptly filed, and the taxpayers' rights would have been protected as shown by the Congressional intent of the Statute.

The respondent seeks to avoid the effect of lack of notice to the attorney on these grounds:

1. That under the Power of Attorney, respondent was only obliged to send a "copy" to the attorney, and that failure to do so did not affect the fact that the notice was sent to the residence address of taxpayers.

2. That the Power of Attorney was not notarized, even though the Director's office had recognized its validity by negotiations and discussing the case over a substantial time, and even though its own internal directives had acknowledged its validity, made no complaint for "incompleteness," held it for many

months, and only used lack of notarization as an excuse after taxpayers' attorney had inquired as to how an assessment could have been levied without first sending a notice of any kind. (No 30-day notice was ever sent in this case, as is customary.)

3. That P. L. 89-332 (5 U.S.C. 1012 and 1013; 5 U.S.C.A. 500) did not apply to the Internal Revenue Service, and that the provisions of that new law did not alter the provisions of Section 6212 of the Internal Revenue Code which respondent claims merely required notice to the taxpayers' last known address, whether or not he was represented by an attorney and then even if the law did apply to the Internal Revenue Service, that a statement of the attorney that he was an attorney in good standing was not furnished.

The petitioners contend:

1. That when a Power of Attorney was filed on printed forms furnished by the taxpayers, and the Internal Revenue Service knew that it was the intent of the taxpayers that all matters would be thereafter handled by the attorney that:

a) The Government would be estopped to deny its responsibility to send a copy of any document to the attorney and could not merely ignore the instructions by sending the original to the taxpayers and ignoring the mandate of the Power of Attorney to furnish a copy to the attorney.

b) The Government's argument to the effect that since it was required to send the "original" to the taxpayers that failure to send a "copy" to

the attorney did not affect the validity of the service was not sound, since it would permit the Power of Attorney to be ignored at the pleasure of the Service.

2. That when a Power of Attorney has been received and accepted as valid and negotiations are conducted with the attorney pursuant to its authority, lack of notarization can be waived and is not even required if signed by an enrolled attorney (enrollment not required since P. L. 89-332). (A fully notarized copy was inadvertently retained in the attorney's files and would have been immediately substituted if the deficiency had been called to the attorney's attention.) (Tr. 47).

3. That Public Law 89-332 was intended to correct the very abuse which occurred in this case (the intent to deprive taxpayers of their rights to have an income tax claim reviewed rather than to *assure* proper notice and opportunity to be heard).

By its terms P. L. 89-332, (5 U.S.C. 1012 and 1013; 5 U.S.C.A. 500) *requires* that notice shall be given by all public agencies to a lawyer when he notifies them of his representation, and had such a notice been sent this problem would not have arisen.

The taxpayers feel that the Court's adoption of the Government's position is improper and that it erred in adopting the Government's argument, in toto and substantially verbatim.

SPECIFICATION OF ERROR NO. 1

The Court erred in finding that the Notice of Deficiency was sent to Petitioner at his last known address pursuant to Section 6212 (I. R. C. 1954) (Opinion, p. 2) for the reason that the taxpayers had been divorced and had notified the District Director of other addresses.

Points and Authorities

1. Section 6212, I.R.C. 1954 (26 U.S.C. 6212) requires that a Notice of Deficiency be sent to taxpayer at his last known address.

Section 6212 (b) insofar as it is applicable states as follows:

"(b) address for Notice of Deficiency

"(1) Income and gift taxes—in absence of notice to the secretary or his delegate under Section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect to a tax imposed by sub-title A or Chapter 12, if mailed to the taxpayer at his last-known address shall be sufficient for purposes of sub-title A, Chapter 12, and this chapter even if such taxpayer is deceased, or is under legal disability, or, in the case of a corporation, has terminated its existence.

"(2) Joint income tax returns—in the case of a joint income tax return filed by both husband and wife, such notice of deficiency may be a single joint notice except that if the secretary or his delegate has been notified by either spouse that separate residences have been established, then, in lieu of a single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last-known address."

2. *"The last-known address"* of a taxpayer means "last" and "known" and that means "last" and "known" to the District Director from information in his files or readily available to him by cursory inquiry, and he can not ignore information in his own file relative to insuring improper notice to taxpayer.

U. S. v. LeHigh, (DC Ark 12-28-61) 201 F. Supp. 224.
Stewart v. Commissioner, (CA 6 1951) 186 F.2d 239.
Williams v. U. S., (CA 6 1959) 164 F. Supp. 874 affirmed 264 F.2d 227.
D'Andrea v. Comm., (CADC 1959) 263 F.2d 904.
Boren v. Riddell, (CA 9 1957) 241 F.2d 670.
Schildhans v. Moe, (CA 2 1963) 319 F.2d 587.
Eppler v. Comm., 188 F.2d 95.
Arlington Corp., 183 F.2d 448.

3. The intent of the legislature is to assure that a taxpayer receives notice of a claimed deficiency in order that he may petition his government if he so desires.

U.S. v. Lehigh, (USDA W. Dist. Ark. 1961) 201 F. Supp.
Boren v. Riddell, (CA 9 1957) 241 F.2d 670.
Tenzer v. Commissioner, (CA 9 1962) 285 F. 2d 965.
Cohn v. U. S., (CA 9, 1962) 297 F.2d 970.
P.L. 89-332 (5 U.S.C. 1012 and 1013; 5 U.S. C.A. 500).

Argument

The Tax Court assumes in its opinion that the "last known address" of the taxpayer was the address to which a notice of deficiency was mailed.

It arrives at this conclusion for the following reasons according to its opinion:

1. Petitioner resided at the address to which a notice was mailed from 1957 to 1961 when he was divorced (Opinion, p. 7, Tr. 74).

2. Although he left that address for intervals in 1961, he has resided at that address since 1962 (Opinion, p. 7, Tr. R. 74).

a. In support of the above conclusion, the Court states:

1. Petitioner used that address as a mailing address to receive mail from his attorney;

2. That address was used upon income taxes.

3. The address was used upon some (but not all) consent forms extending the period of limitations for assessment.

4. Powers of Attorney used that address.

5. That address was used as an address for the purpose of stating residence in a petition to this Court.

6. That the petitioner never requested or directed any agent of respondent to change his address from 6325 S. W. Alfred Street, Portland, Oregon, to any other address.

Petitioner contends that the facts stated as supporting the conclusion do not in fact support that determination for the following reasons:

STATEMENT 2(a)1:

The address was used by his attorney to correspond with taxpayer.

When the determination is to be made as to whether the Commissioner used the correct address, the fact must be inquired into as of the time of the mailing of Notice of Deficiency and whether or not he used the address "known to him" to be the address best calculated to insure reception by the taxpayer *at that time.*

Whether or not a particular address was used by petitioner to receive mail from his attorney was (1) neither known to the District Director in June, 1966, (the date of mailing the Notice of Deficiency); (2) nor prior to the hearing on the motion to dismiss.

The attorney was not appointed until March 17, 1966, (Exhibit H, Tr. 36), and there is no evidence whatsoever to show that the District Director's file contained any information to the effect that the address used to mail the Notice was the address used by the attorney to correspond with petitioner.

While the fact may be true, the point is here made that the record is silent that the District Director could have relied on that fact in determining where to send the "notice" in order to best assure notice because it was not known to him at the time he sent the notice.

The fact therefore, whether true or untrue, is not supported by any evidence except the testimony of the petitioner at the time of the trial of this case on April 17, 1967.

STATEMENT 2(a)2:

The address was used on income tax returns.

It is believed that this may be evidence of a mailing address, but the use of an address on a current tax return is scarcely entitled to very great weight, since it is probable that the average taxpayer is many times not even aware of the address used in his returns when prepared by someone other than himself (here, Cascade Accounting Service) (Tr. Vol. II, 76).

It is even more certain that the agent (Carrier) who actually instituted the Notice, never even looked at those returns for the purpose of determining the address and current returns were surely not intended as an "address for a Notice of Deficiency" should such notice be sent some time in the future. There is absolutely no testimony from anyone from the District Director's office of what documents (if any) were consulted in order to secure the address for mailing the Notice of Deficiency.

In fact, all tax returns did not use that address (Tr. Vol. II, 75).

STATEMENT 2(a)3:

The address used upon some forms which granted the Government an extension of the period of limita-

tions contained the address used for mailing the Notice of Deficiency.

That some of said forms did contain such an address can not be disputed, but there are two things wrong about placing any reliance on that fact.

1. The address was not placed there by the taxpayer, but rather was typed there by a revenue agent who handed the form to taxpayer's ex-wife who later handed them to taxpayer with instructions to sign and return (taxpayers were not represented by counsel at those times) (Tr. Vol. II, 34, 47) (Ex. 2, Tr. Vol. II, 77) (Tr. Vol. II, 115).

2. Taxpayer did change an address on one of the forms, and the agent knew that he was not available and out-of-town; (Tr. Vol. II, 47) that the agent never at any time contacted Jack Houghton at the address used to mail the Notice of Deficiency and never sent extension forms or any of them to that address (Tr. Vol. II, 33-34).

In fact, the agent once sent one Form 872 to Jack Houghton at an apartment, (Tr. Vol. II, 34) and another time one of the consents contained another address (Tr. Vol. II, 115, Ex. 2).

STATEMENT 2(a)4:

The address used for mailing the Notice of Deficiency was the same as that on the Power of Attorney filed with the District Director.

The things that are wrong with this fact are (1)

the respondent claims that this Power of Attorney was void because not notarized (not good enough to constitute a Power of Attorney and used as an excuse not to send copies of the Notice to the attorney in spite of an "internal directive" to do so), but apparently desire to recognize it insofar as it constitutes an address for petitioner to which a Notice of Deficiency could be sent; and (2) there was no testimony that the address used on the Power of Attorney was relied upon for the mailing of the Notice of Deficiency.

The fact is that the agent (Carrier) testified that he had completed his report and sent it to review before he ever had any knowledge of the existence of the Power of Attorney (Tr. Vol. II, 39-43) and he therefore had apparently used a different source from which to complete his report.

It would seem that if respondent relies on the address contained in the Power of Attorney that it must rely on its directives as well to send copies to the attorney.

STATEMENT 2(a)5:

That address was used as an address for the purpose of stating residence in a petition to the Court.

It is obvious, since this petition was filed long after the mailing of Notice of Deficiency in June, 1966, that the District Director did not have the petition in his file at the date of mailing and could not have relied upon it to support the address used as the

"last known address" of petitioner *"at the time of mailing."*

It can thus be seen that each of the matters assigned as a basis for the conclusion that the taxpayer's "last known address" was that used to mail the Notice of Deficiency, fails when examined in the light that either they were not facts in existence at the time of mailing or not relied on or of such a nature as to raise serious doubts as to reliability to insure delivery at that time.

STATEMENT 2(a)6:

That the petitioner never requested or directed any agent of respondent to change his address from 6325 *S. W. Alfred Street, Portland, Oregon, to any other address.*

The argument is cited to support the Court's conclusion that the address was the last known address of taxpayer, Jack Houghton.

It is fallacious in that there is no evidence that Houghton ever asked any agent of respondent to send any mail to that address at any time and further fallacious in that no mail was ever sent to him previously at that address. Why then would he ever ask that his mailing address be changed and of what significance is such a statement in supporting the Court's conclusion?

FACTS TO SHOW DOUBT:

1. Taxpayer had been divorced (Ex. 5) (Tr. Vol. II, 78) (Tr. Vol. II, 85, 110-113).

2. Taxpayer filed separate returns.

3. Wife's separate returns after divorce carried a different address from that of her ex-husband, and a different address from that contained on numerous extension Forms 872 typed by the revenue agent and presented for signature of both taxpayers (Tr. Vol. II, 104).

4. Husband had given several different addresses and had not changed addresses after such notice (Tr. Vol. II, 33, 75, 76, 77, 98, 102, 108, 115) (Tr. Vol. II, 62).

The revenue agent who prepared the deficiency notice knew that one of the taxpayers could not be reached and was away for an extended period of time, and therefore, never mailed such extension forms to him at the address used for the notice (Tr. Vol. II, 34).

6. That no correspondence of any kind was ever mailed to him at that address used for mailing of deficiency notice (Tr. Vol. II, 85-105).

7. That no person in the District Director's office ever testified that at any time were any of the facts (relied upon to support the Tax Court's conclusion) used to assure a correct mailing address.

8. That other addresses were available as the last-known address of taxpayers in the file of the District Director or readily available by a simple inquiry (Tr. Vol. II, 37, 55, 58).

9. That the agent had been told to contact the at-

torney for all information (Tr. Vol. II, 90, 99).

10. Use of certified mail requires personal delivery by mailman in order to secure a signature and where it is known that taxpayers were not at home during delivery hours the use of a residence address is not a last-known address when other addresses where delivery can be secured are known to the District Director.

The Tax Court's emphasis has been primarily on the "residence" of the taxpayer.

The statute, however, does not use the term "residence."

Section 6212 uses the term "last-known address." It does not use the term "last-known residence address."

The distinction is important because it supports the congressional intent as this Court found in *Tenzer* v. *Commissioner*, 285 F.2d 956, and the Arkansas Court found in *U.S.* v. *Lehigh*, 201 F. Supp. 224, and this Court's later approval in *Cohen* v. *U. S.*, 297 F.2d 760, which intent was to assure notice to the taxpayer so that his right to review would be protected.

It would thus seem reasonable to assume that the District Director would be required to use at least the information in his files which would lead him to an address (not necessarily a residence address) at which it would be probable the notice would be received.

Reduced to its simplest terms, the evidence dis-

closes a divorce, conflicting addresses, the filing of separate tax returns using separate addresses, no mail from the District Director ever having been sent to the address used, a notice to the agent to forward documents to the attorney, a signed Power of Attorney appointing a practicing attorney as his agent of one of the taxpayers, an internal memorandum to deal with the attorney.

There is little conflicting evidence in this case. Assuming the truth of all statements, the record discloses that addresses in the file of the District Director disclosed (at the time of mailing the Notice) several different addresses for the taxpayers over a period of many years during which time numerous extensions were given to the District Director for his convenience.

Only one addresses in the District Director's files should constitute a mutual (both Mr. and Mrs. Houghton) and current address, to-wit: the address of the attorney. It was and is the "last-known address" of both taxpayers.

The District Director chose to ignore the plain and unambiguous intent expressed by the direction of that Power of Attorney and the intent of P. L. 89-332.

Notice to Patricia Houghton could not be predicated on notice to the same address as that to Jack Houghton since the taxpayer had notified the Internal Revenue Service of a change of address (Tr. 104-105), and by the law of the State of Oregon, there is

a rebuttable presumption that a thing once proved to exist continues to exist (ORS 41.360 (32)).

The District Director chose to ignore the designation, and the direction of that Power of Attorney.

The Tax Court made one observation (Tr. 78) which in part states:

> "The problem involved herein probably could have been entirely avoided . . . if the respondent had notified Erwin that the Power of Attorney was regarded as incomplete."

Even that is extremely doubtful because the internal directives admonish that copies of all correspondence should be sent to the attorney but the internal directive itself was ignored.

So, the "incompleteness" of the Power of Attorney had nothing to do with the lack of notice.

Any defense of incompleteness of the Power of Attorney was a pure after-thought generated by the attorney's inquiry as to how an assessment could be entered without "any" notice (Tr. 48, Ex. G).

But it is undisputed that the "Power of Attorney" and the internal directives were ignored.

As stated in the case of *Eppler* v. *Commissioner*, (C.A. 7, 1951) 188 F.2d 95:

> "The Commissioner should not be permitted to defeat the purpose of the remedial statute by so misleading the taxpayers. Congress intended that the taxpayer should be given his right of appeal only to correct possible errors of the Com-

missioner in determining the amount of the deficiency."

The petitioner and his attorney could not help but regret the accidental filing of a power of attorney form without notarization but this omission was scarcely the cause of the difficulty, since the respondent contends (and the tax court agrees) that it could ignore even a fully-executed Power of Attorney without affecting the validity of the notice of deficiency (Tr. 79) and that the sending of notice to the attorney was a pure courtesy.

Nor, is a notarization of a power of attorney necessary to the validity of the power of attorney if the form is certified by an enrolled attorney (Ex. H, Tr. 36).

Technical information Release 854, Advance Revenue Procedure, 66-44, I. R. B. 1966-42 states as follows:

"*Sec.* 4-06

Pending issuance of amended Power of Attorney regulations, the certification at the bottom of Power of Attorney forms, 2848 and 2428A, which is in lieu of witnessing or notarization of the principal's signature may be executed by an attorney or certified public accountant who qualified to represent the principal under Section 10.3 (a) or (b) of Circular 230 (revised) appropriate forms and tax returns will be revised accordingly at the earliest practicable date."

That section was effeceive as of 9-13-66, and dated 10-3-66.

Prior to that Regulation 601.504 (5) (ii) was effective. It states as follows:

> "(ii) Exception. If the Power of Attorney is granted to an attorney or agent enrolled to practice before the Service and the agent certifies on the Power of Attorney that he is so enrolled, the acknowledgment under sub-division (1) of this paragraph shall not be required."

The regulation provides no special form for certification that the attorney is so enrolled.

In this case, the attorney affixed his enrollment number to the power of attorney (Ex. H, Tr. 36) and forwarded it under a covering letter bearing his signature. This would appear sufficient when the power of attorney was forwarded on the letterhead of the attorney and the letter was signed by the attorney (Ex. C, Tr. 28 stipulated fact 2, Tr. 47) and his enrollment card is in evidence (Tr. 63, Ex. 3).

From the language of Regulation 601.504(5)(ii), it is apparent that what is intended is that when an enrolled practitioner is designated under the power of attorney that the acknowledgment is no longer needed, due to the fact that the qualification of the practitioner is established by his admission to practice.

It is undisputed that the District Director was advised both as to the name of the enrolled practitioner and his enrollment number.

The Court holds that the power of attorney which states:

". . . copies of correspondence addressed to taxpayer in proceedings involving the above matter(s) should be sent to:
Warde H. Erwin, 3323 SW. Harbor Drive, Portland, Oregon" (Tr. 36)

is of absolutely no effect and that if the district director chooses to ignore the direction, it has no effect on his procedure and that notification to the attorney is a mere courtesy to be indulged in solely at the pleasure of the district director (Tr. 79).

The court further holds that such a direction does not "*in and of itself*" constitute a change of address (Tr. 79). However, the Court states that if the power of attorney form states that "originals" instead of copies be sent to the attorney that the power of attorney form does constitute a change of address and cites *D'Andrea* v. *Commissioner*, (C.A.D.C. 1959) 263 F.2d 904.

The Court recognizes, but passes quickly over Revenue Procedure 61-18:

It states (Tr. 79):

"The same revenue procedure provides that where the Power of Attorney merely directs that COPIES be sent to the attorney, that fact alone does not effect a change of last-known address of the taxpayer. *Each case must turn on its own facts.*"

That revenue procedure reads as follows:

"In general, it will be the Internal Revenue Service practice to *regard the address of the duly*

authorized representative as constituting the last known address of the taxpayer within the meaning of 6212 (b) of the Internal Revenue Code of 1954, in cases where, subsequent to the date on which he files a return on the taxable year, or concurrently with such filing, the taxpayer files a Power of Attorney with the Internal Revenue Service which authorizes the designated attorney to represent him and requests that 'all communications' concerning his tax matters with regard thereto, or concerning a proposed deficiency in tax for that taxable year be mailed to his attorney at his attorney's request. See *Mary Jo Williams, Adm.* v. *U. S.*, 264 F.2d 227 (1959), and *Marjorie F. Birnie* v. *Commissioner*, 16 T. C. 861 (1951).

"Under different facts and circumstances a determination as to what is taxpayer's last-known address will still be made on the basis of the particular facts involved, the requirements of 6212 (b) of the Code, and the applicable case law. For example, in cases in which the Power of Attorney directs that 'a copy of all communications' addressed to the taxpayer be sent the named attorney. The Tax Court of the United States has held that a notice sent directly to the taxpayer by registered mail at his last-known address will give the Tax Court jurisdiction upon the filing of a timely petition, *Draper Allen, et ux* v. *Commissioner*, 29 T. C. 113 (1957). Compare *Clement Brzezinski et al* v. *Commission*, 23 T. C. 192 (1954)."

The tax court states that the case law supports

the respondent (Tr. 80). However, it merely cites the two cases cited in the above revenue proceeding.

It fails to cite cases holding the notice to the attorney has also been held to give the tax court jurisdiction.

Stewart v. Commissioner, (C.A. 6, 1951) 186 F.2d 239.
Joseph Delman, T. C. Memo (C.A. 3) (App. 4-21-66) 20 AFTR2d 5543.
Birnie v. Commissioner, 16 T. C. 861 (1951).
Williams v. U. S., 164 F. Supp. 874, 264 F.2d 227.

It would appear that there are three or four cases in support of taxpayer's position against two for respondent of which both are of doubtful application since the *Allen* case holds that jurisdiction was acquired by a notice to taxpayers where a timely petition was filed, but that case does not hold that a notice to the representative followed by a timely petition would not likewise have conferred jurisdiction.

The two other tax court cases cited (*Parker*, 1949, and *Hurd*, 1947) were both early cases determined many years prior to the Revenue Ruling, and prior to the *Williams* and *Birnie* cases and much before the Ninth Circuit cases of *Tenzer* v. *Commissioner* and *Cohen* v. *United States*, (297 F.2d 760).

The tax court does cite *Cohen* v. *U. S.* but quotes from that opinion only the discussion relative to the constitutional question (Tr. 82).

The citation from the *Cohen* case which is ap-

plicable to this case and which should have been quoted, is as follows:

> "We concluded, citing Boren and the dissent in Dolezisk that the 90 days ran from the time of personal service, basing our consideration on fairness and stating, 'When the Commissioner chose personal service, he abandoned the other method (p. 958).' We also said, 'We also hold when the notice was correctly addressed, registered, and mailed that it was not wholly void, (for example, it was probably good enough to avoid the statute of limitations! (p. 958).' Apparently, we had not made up our minds as to which date should govern when we decided *Rosewood Hotel, Inc.* v. *Commissioner*, 275 F.2d 786 (1966). We did so in Tenzer."

The tax court stated that the petitioner relies on the *Tenzer* case (Tr. 81). That statement was true, then, and is true now.

The tax court attempts to distinguish the *Tenzer* case. It does so on the narrow ground stating:

> "By contrast, the respondent in this case did not abandon his mailing method of service in favor of personal service. We seriously doubt whether the Court of Appeals would take the liberty of extending its *Tenzer* rationale to cover this situation since it specifically stated (285 F.2d at p. 958):
>
> We see a consistent pattern in the cases that The Commissioner customarily uses registered (or now certified) mail. Well, he may, because with that, he has some idea when he stands under the statute."

Petitioner has no trouble with the *Tenzer* rationale, but there would seem to be a great difficulty in understanding the attempted distinction or exactly how the commissioner's use of registered or certified mail supports the conclusion that the commissioner did or didn't abandon the mailing by delivery of another copy to the petitioner.

Surely, the Tax Court doesn't contend that the commissioner (District Director) intended in *Tenzer* to abandon his mailing by giving actual personal notice.

The court said in *Tenzer:*

> "If the charge be made that we take liberties with the statute, it may be so. Anyone should try to make it work, and we have sought the true meaning of Congress believing it intended to make it work.
>
> "The order of the Tax Court dismissing for lack of jurisdiction are reversed."

It is not words that we look to in case law, but principles.

In *Tenzer*, the court found an incomplete delivery by mail. The commissioner said it was good. The court disagreed. The principle of the *Tenzer* case was that where there had been a divorce (after the notice was sent) and the notice was not received by any mail that the intent of Congress was to start the period running from the time that the petitioners first had an opportunity to petition the tax court (which was when they received notice by actual delivery of a Deficiency Notice.

The identical principle seems even more applicable here. There was a divorce, a confusing polygot of various addresses, a power of attorney which was ignored, dealings with the attorney, and eventually delivery to the attorney of a copy of the notice of deficiency (Ex. I, Tr. 37) on or about November 17, 1966.

A petition was filed within ninety days of that date.

The *Tenzer* case principles have been adopted by the Arkansas District Court in the cases of *U. S.* v. *Lehigh*, 201 F. Supp. 224 where it was stated:

> "The problem is discussed in *Boren* v. *Riddell*, (C.A. 9) 241 F.2d 670. See also *Tenzer* v. *Commissioner*, (C.A. 9) 265 F.2d 965 and *Mertens Op. Cit.* #49.133. The basis of the later holdings is that the older statute, Section 274(a) of the Internal Revenue Act of 1924 provided that the taxpayers shall be notified of a deficiency by registered mail whereas under Section 274(a) of the Internal Revenue Code of 1926 and under the 1939 and 1954 Codes, the Secretary or his delegate is simply 'authorized' to use registered (or certified) mail as a means of giving notice. It was not thought in *Boren* that the change in statutory language was not without significance and that the 'heart of the taxpayer's right is to have actual notice which enables him to petition his government if he so desires (241 F.2d 672)."

The plain and unvarnished truth is that the revenue service (supported to some substantial degree by the tax court) now and historically are doing all

possible to thwart fair and impartial dealings between that governmental agency and the citizen.

While there can be no question that the taxpayers' attorney's office inadvertently sent an incomplete power of attorney, it was nevertheless recognized as valid and was unquestioned by the service who required the revenue agent who prepared the revenue agent's report from which the notice of deficiency was copied to add the following (Tr. Vol. II, 42-3):

> "The power of attorney has been received so a statement to the effect that a copy of the report should be sent to the representative and should be added to the preliminary statement. The response (sic) statement not included on original report for reason taxpayer did not have representation during course of examination, power of attorney, submitted after report submitted."

The form used for that memorandum was form 3990 and 3990A.

No explanation has ever been given as to why the attorney was not notified pursuant to the directive set forth above.

The opinion of the tax court is merely a substantially verbatim copy of the respondent's brief. It does little to create the feeling that a fair and impartial hearing has been held on matters on which appellant had done considerable research.

About all, that can be said, is that the system of substantial copying of the government's brief results in a more expeditious determination of a dispute but

adds little to confidence by the public that the court has carefully examined the authorities cited nor considered carefully the arguments of the taxpayer.

The opinion of the court as to estoppel merely states (Tr. 82):

> "We likewise reject the estoppel arguments advanced by petitioner for the reasons previously stated. There is no merit in invoking the doctrine of estoppel against the Commissioner under these circumstances."

Whether estoppel will or will not need to be considered in determination of this case will be for this Court to decide, but the statement that there is no merit in the contention without citation of authorities or supporting facts appear to be questionable.

An analysis of the agent's testimony is revealing.

The agent's name was Carrier.

Carrier testified he didn't know of Erwin's power of attorney until after the requests for extension (form 872) were issued.

On page 53, (Tr. Vol. II, 53) he testified as follows:

> "Q. And the only discussion you had with Mr. Erwin was in connection with those consent forms?
>
> A. Right."

By the foregoing, Carrier claims that he didn't know of Erwin's power of attorney until after the issuance of the consent forms because this was the

only conversation with the attorney and the sole subject of the discussion was to see if the consent forms were going to be sent (Tr. Vol. II, 50).

He testified (Tr. Vol. II, 53):

"A. I believe that I may have called Mr. Erwin after those 872's were sent out.

Q. Those are these consent forms? And why did you call Mr. Erwin?

A. To see of they were going to be remitted."

By Exhibit D, stipulated fact 3 (Tr. 30) it is known that the 872 forms were not issued until after April 4.

Since they were hand-delivered to Mrs. Houghton, and then given to Mr. Houghton, it would have had to be a day or two at the very earliest before Carrier would have called to find out why the extension consents had not been sent.

Since we know that there were three calls originating with Carrier and placed to the attorney Erwin, two of which were after April 4, it must have been no earlier than the earliest of those two. The earliest of those calls was on April 15, 1966, at twelve noon (Tr. Vol. II, 69).

Thus, by Carrier's own testimony and the telephone records, it is established that Carrier claimed that he didn't know of Erwin's representation of the taxpayers until April 15, 1966, at the earliest.

By Carrier's own testimony, it is further claimed that he talked with Erwin on only one subject

"whether or not the consent forms were going to be permitted."

The records prove Mr. Carrier's testimony is unreliable.

He *"originated"* a call to the attorney on March 24, at 11:02 a.m.

Since that was prior to the date of issuance of the request for extension forms, the subject of that call could not have been the extension forms. It must have been in regard to the merits of the claim.

Since that call (March 24, 1966) was a week prior to the return of the agent's report from the review staff (March 31, 1966) stipulated (Tr. 58) Carrier's testimony that he didn't know of Erwin's representation until after the report was returned is false.

His claim that the only subject of conversation with Erwin was whether or not the consent to extension forms were going to be delivered is likewise false since he originated a call to the attorney before the request for extension forms were even issued.

From the foregoing, it must clearly appear that Carrier knew of the power of attorney and since it was addressed to him personally at his room number and mailed on March 18, and received on March 19 (stipulated fact #2), it must be assumed he had seen and acted upon it when he originated his call to the attorney on March 24, and that the subject of that call could not have been the extensions which weren't then even issued or requested.

What happened to the power of attorney between the time it was received by Carrier presumably and the time it was delivered to the review section is known only to the service but the existence of an attorney was well known both to review and to the agent.

Of significance is the use of the word "The" in the language of the direction to Carrier from the review staff relative to that power of attorney (Tr. Vol. II, 42).

If the existence of the power of attorney was neither known nor suspected by the service, the article "a" would have been used in the directive instead of "the."

The directive would have read:

"*A* power of attorney has been received . . . ."

Instead of

"*The* power of attorney has been received . . . ."

Can it be doubted that a power of attorney had been received and discussed within the service?

Further analysis of the directive is likewise interesting because the review section on March 31, 1966, was telling the agent (Carrier) what to put on his report to explain the lack of any statement on the report concerning the attorney:

> ". . . *statement (that the power of attorney had been received) not included on report for the reason taxpayer did not have representation during course of examination. Power of Attorney submitted after report submitted.*"

Why was it necessary to state that the power of attorney was received after the report was filed and to whom?

It seems logical that the report had not been completed and submitted to review when the power of attorney form was received but that the note from review was a "cover up" for Carrier's nondisclosure that a power of attorney had been in fact made a part of the record and received by him.

A conversation had already been had between the attorney and Carrier and the power of attorney was requested by the agent, Carrier, and forwarded at his directive to his room number and post office box (stipulated fact 2) (Tr. 47) which would not have in any other manner been known by the attorney on March 18, 1966.

It is likewise probable that he told the attorney prior to that time that he was then in the process of preparation of the report, since the letter transmitting the power of attorney on March 18, 1966, states:

> "It would be appreciated if you will forward the schedules you have, *if any*."

It is almost a certainty that Carrier did not intend to deal with any attorney because even after he was aware of the power of attorney, he called the client directly (Tr. Vol. II, 53) and he was again directed to take up all matters with the attorney whereby he was compelled to call. (The subject matter of the call concerned the 872 extension forms (Tr.

Vol. II, 53) and therefore had to have taken place after April 4—Carrier's directive from review by their own records is on March 31).

It is entirely unexplained by the government why no copy of the report was sent to the attorney after their own directives required that to be done.

The final excuse regarding the incompleteness of the power of attorney form was not given until after an inquiry was made as to how they arrived at the assessment stage without notice (October 18—Exhibit G, stipulated fact #7) (Tr. 48) to anyone.

The evidence in this case indicates an apparent and unexplained deliberate attempt to keep the attorney from examining the report or any notice.

If it be explained on the ground that the 30-day letter was omitted, because of the imminence of the expiration of the period of limitations on assessment, that is little excuse where the imminent expiration of the statute of limitations was caused by their own acts.

The entire conduct if intentional, is less than commendable.

In *Stearns* v. *U. S.*, 291 U.S. 54 at page 61, it is said:

> "The applicable principle is fundamental and unquestioned. He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned for the law says to him in effect: 'this is your own act and

therefore you are not damnified.' Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for either."

Other cases supporting the same principle are:

Robbins v. U. S., 21 F. Supp. 403.

Exchange & Savings Bank of Berlin v. U. S., 226 F. Supp. 56.

Johnson v. Commission, 2 O.T.C. Adv. Sh. 521.

Simmons v. U. S. (C.A. 5, 1962) 308 F.2d 938.

Schuster v. C. I. R. (C.A. 9, 1962) 312 F.2d 311.

SPECIFICATION OF ERROR II

The Court erred in finding that the provisions of P. L. 89-332 (5 U.S.C. 1012 and 1013, 5 U.S.C.A. 500) does not apply because petitioner did not file with the Internal Revenue Service a declaration that he is a member in good standing of the Bar of the highest court of any state and in further finding that even if a sufficient declaration was filed, that the provisions of the law did not affect the validity of notice sent to petitioner without notice to the attorney and that the statute did not make it mandatory to send a copy of the notice to the attorney.

Points and Authorities

Public Law 89-332 (5 U.S.C. 1012 and 1013, 5 U.S.C.A. 500) requires that any notice required to be given to a participant before any government agency shall also be given to the attorney or certified public accountant representing him.

P.L. 89-332 (set forth in appendix in full).

No form of written declaration is specified in the law to show that the petitioner is represented, and the attorney is duly licensed to practice.

P. L. 89-332 (Tr. 86-7).

The purpose of P. L. 89-332 was to require the agencies to deal with the counsel selected by a participant.

SENATE REPORT No. 755, 89th Congress, 1st Session. (Set forth in appendix in full). (Tr. 85)

HOUSE REPORT No. 1141, 1st Session, p. 4170.

A law which is mandatory in its clear terms and which has for its purpose *that governmental agencies shall deal with counsel selected by a participant who is appearing before such governmental agency* which provides that notice shall be given to such representative "*in addition to any other notice specifically required by statute*" amends all other statutes requiring notice to a participant by adding to such statutes a requirement that notice shall be given to the participant's legal representative and failure to do so renders the notice incomplete and void.

Public Law 89-332 (5 U.S.C. 1012-1013, 5 U.S.C.A. 500).

Argument

The Court held that Public Law 89-332 was not applicable for two reasons:

1. There was an insufficient (or no) representa-

tion that the attorney was "currently qualified" (Tr. 86)

2. Assuming there was a proper declaration, Public Law 89-332 did not affect the validity of a Notice of a Proposed Deficiency required by Section 6212 of the Internal Revenue Code.

a. Because the law merely requires an "additional service" (Tr. 88 (n)), and

b. The intent of the statute was merely to do away with agency-established requirements for representatives (as applied to attorneys and certified public accountants (Tr. 85).

Petitioner submits that the Court's finding was erroneous in all respects.

As to whether or not there was a sufficient written declaration that the attorney was qualified, the petitioner states as follows:

1. That a declaration is required to the effect merely that the attorney is "currently qualified."

2. That the statute does not specify any particular form for such declaration.

3. That the notification to the agency was accomplished by the attorney's signature and an enclosure by which he was appointed by the taxpayer as his representative to do all things which the taxpayer could do (except endorse and collect checks). On the appointment form was also included the number of the attorney's enrollment

card (63-11776) (previously required prior to passage of P. L. 89-332 (Ex. H, Tr. 36) which enrollment card indicated that the representative was "*currently*" enrolled to practice "*as an attorney*" before the U. S. Treasury Department.

It is admitted that no form is required by the statute to notify the Internal Revenue Service (Last sentence, Tr. 86) of the attorney's qualification or representation.

Does the word "declaration" as used in the statute mean a "formal statement?" That is the interpretation required by the Tax Court. The taxpayer contends that what is meant is a statement or statements sufficient to advise the agency (1) that the representative is "currently qualified as an attorney and represents the client."

The dictionary definition of "declare" being "to make known, reveal or explain" should be sufficient to accomplish the intent of the statute.

The Court can, if necessary, take judicial notice that the State of Oregon has an integrated bar and that it is unlawful for a person, not currently licensed, to practice law or hold himself out as a lawyer, but it would not appear necessary where there was a sufficient declaration in any event. (See ORS 9.160 and ORS 9.220. Also ORS 41.360 (33) to the effect that there is a presumption that the law has been obeyed).

It can scarcely be doubted in this case that the

Service knew of the qualification of the representative and having themselves recognized that fact by its own internal memorandum (Tr. Vol. II, 42) and in any event by dealing with the representative. Any formal omissions as to current qualifications would be surely waived by their actions in dealing with the representative.

The executed power of attorney form fully advised that the attorney represented the taxpayers when forwarded under cover of the attorney's letterhead and over his signature.

The Tax Court did not cite any authority for its statement that Public Law 89-332 merely required an "additional service" and did not affect the provisions of Section 6212 requiring notice of deficiency to be sent to the taxpayer.

The reasoning escapes the writer of this brief. The statute says notice to a representative "*shall be sent to the representative in addition to any other notice.*"

What would those words mean if they mean (as the Tax Court holds) that any agency may ignore that statute and it will not affect the other required notices?

The conclusions seem too clear to require argument. The error here also probably came from merely copying the respondent's brief.

The last reason given for finding that Public Law 89-332 had no application was that the "*intent of*

Congress" was merely to take away the licensing requirements set up by several governmental agencies.

It is surely agreed that the "intent of Congress" is the law.

Williams v. USFG, 236 U.S. 541.

It is further agreed that part of the purpose in adopting P. L. 89-332 was to remove agency-licensing restrictions insofar as attorneys and certified public accountants are concerned.

However, that was only one part of the legislative purpose.

The committee report quoted on page 85 of the transcript in a note to the Opinion, states in the last sentence:

> "*It would also require the agencies to deal with the counsel so selected.*"

The last statement is completely ignored in the Tax Court Opinion.

The Congressional intent (as it applies to this case) is clear and has been completely ignored.

CONCLUSION

The intent of Congress as previously set forth by this Court in the case of *Tenzer* v. *Commissioner*, would appear to be all that was necessary to determine this case.

The ultimate determination to dismiss for lack of

jurisdiction may, however, have to be affirmed.

As the writer now understands it, if there has been no notice given, due to failure to comply with Public Law 89-332, then the Tax Court would not have jurisdiction for failure to send a notice pursuant to Section 6212, since the mailing of notice is a jurisdictional requirement to Tax Court jurisdiction under 26 U.S.C. 6213 which states insofar as applicable:

> ". . . no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day . . . period."

Nathaniel A. Denman, 35 T. C. 1140.

Thus, a holding that the Revenue Service failed to comply with Public Law 89-332 (5 U.S.C. 1012 and 1013, 5 U.S.C.A. 500) would permit these parties to start all over again so that the case may again be put in its proper posture.

A holding that Public 89-332 is not applicable would require a determination of when (if at all) proper notice has yet been mailed to petitioner at his *last known address.*

If it had not been properly mailed, then the Court would not have jurisdiction unless the Court found that actual notice through delivery to the attorney's office in November, 1966, was sufficient notice in which case the Tax Court does have jurisdiction, and the Tax Court could proceed to determine the matter on the petition.

Petitioner feels that the holding should be based upon Public Law 89-332 requiring new notices followed by new petition.

Argument for Specification of Error III omitted.

Argument included under Specification V.

Respectfully submitted,

WARDE H. ERWIN
Attorney for Appellant

APPENDIX

Public Law 89-332

AN ACT

To provide for the right of persons to be represented in matters before Federal agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That—

(a) Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia may represent others before any agency upon filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular party in whose behalf he acts.

(b) Any person who is duly qualified to practice as a certified public accountant in any State, possession, territory, Commonwealth, or the District of Columbia may represent others before the Internal Revenue Service of the Treasury Department upon filing with that agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular party in whose behalf he acts.

(c) Nothing herein shall be construed (i) to grant or deny to any person who is not qualified as provided by subsection (a) or (b) the right to appear for or represent others before any agency or in any agency proceeding; (ii) to authorize or limit the discipline, including disbarment, of persons who appear in

a representative capacity before any agency; (iii) to authorize any person who is a former officer or employee of an agency to represent others before an agency where such representation is prohibited by statute or regulation; or (iv) to prevent an agency from requiring a power of attorney as a condition to the settlement of any controversy involving the payment of money.

(d) This section shall not be applicable to practice before the Patent Office with respect to patent matters which shall continue to be covered by chapter 3 (sections 31 to 33) of title 35 of the United States Code.

Sec. 2. When any participant in any matter before an agency is represented by a person qualified pursuant to subsection (a) or (b) of section 1, any notice or other written communication required or permitted to be given to such participant in such matter shall be given to such representative in addition to any other service specifically required by statute. If a participant is represented by more than one such qualified representative, service upon any one of such representatives shall be sufficient.

Sec. 3. As used in this Act, "agency" shall have the same meaning as it does in section 2(a) of the Administrative Procedure Act, as amended (60 Stat. 237, as amended).

Approved November 8, 1965.

The purpose of Public Law 89-332 is stated in Senate Report No. 755, 89th Cong., 1st Sess., as follows:

> This legislation is designed to do away with agency-established bars for attorneys who ap-

pear before certain Federal administrative agencies. In those agencies which require that lawyers become members of such bars to represent clients before the agency, lawyers have met with delays attempting to deal with even the most routine tasks. The responses of attorneys prompted by this bill's introduction cite examples of difficulty in attempting to bring even simple matters before these agencies.

The bill would do away with agency-established admission requirements for licensed attorneys, and thus allow persons to be represented before all Federal agencies by counsel of their choice. It would also require the agencies to deal with the counsel so selected.